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Incest and Ethics: Confidentiality's Severest Test

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INCEST AND ETHICS: CONFIDENTIALITY'S SEVEREST TEST

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PROLOGUE

All attorneys in the United States are required to comply with the code of professional responsibility adopted by their jurisdiction. These codes all contain a confidentiality principle forbidding disclosure of a client's confidential communications. Because attorneys cannot properly advise their clients without knowledge of all the facts, the confidentiality principle theoretically insures full disclosure by assuring the client that confidential communications will remain secret. Although the confidentiality requirement is generally valid, its legitimacy is questionable in a situation where an attorney is forbidden to disclose an act which has harmed and may continue to harm an innocent child.

This article discusses an attorney's ethical dilemma when faced with the confidentiality requirement in light of his client's confessed incestuous relationship with the client's nine-year old daughter. Although some states have enacted legislation and code amendments to encompass this situation, most jurisdictions have not expressed definitive guidelines for an attorney faced with this dilemma. The following is a study of an ethics committee in the mythical state of Marshall exploring three possible courses of action in an attempt to answer an inquiry from a practitioner faced with this situation.

JOHN BARRISTER
Attorney at Law
October 15, 1983

Lawrence Sage, Esquire
Chairperson, Marshall State Bar Association
Committee on Professional Ethics
Dear Mr. Sage:

I would appreciate an advisory opinion from the Committee on Professional Ethics on the proper course of conduct in the following situation in which I am presently involved. Neglect proceedings have been filed against an indigent family. I have been appointed to represent the mother and father at the hearing. The petition alleges that the couple's three children,

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aged three, six and nine, are not receiving proper care. They are dirty and inadequately fed. I learned from the husband that he has been having sexual intercourse with their nine year old daughter for the past two years. The wife confirms this and privately tells me that she is afraid to interfere. I have reviewed the report of the child welfare investigation ordered by the court. The report, which includes interviews with the children, confirms my belief that no one except the mother has discovered the father's mistreatment of the child.

As court-appointed counsel, what are my ethical obligations? Should I disclose the father's incest? If I do not, I am afraid it will continue. I think he needs some kind of treatment or therapy. If the court does not appoint counsel for the children, should I suggest to the court that counsel be appointed? Even if counsel is appointed, he or she may not find out about the incest because apparently no one has during the past two years. I suspect that the child may be afraid to speak up against her father.

I imagine that other lawyers may have been confronted with this kind of dilemma, but I cannot find any ethics opinions addressing these questions. I would appreciate your advice.

Sincerely yours,
/s/
John Barrister
Attorney at Law

MARSHALL STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Memorandum

TO: Members of the Committee on Professional Ethics
FROM: Lawrence Sage, Chairperson
DATE: January 5, 1984
RE: Inquiry No. 84-1: Disclosure of Confidential Communications

Enclosed are copies of the above-referenced inquiry and supporting materials. The inquiring lawyer asks:

(1) Whether he should reveal confidential communications that his client, charged with child neglect, has been having sexual intercourse with his nine year old daughter for the past two years.

(2) Whether he should suggest to the court that counsel be appointed for the children.

Contrary to custom, the committee *sua sponte* will also address a related question not raised by the inquirer but highly pertinent to his inquiry and a matter of great public interest.

(3) Whether counsel for the children, if appointed, should reveal confidential communications over the objections of one of his clients, a nine year old girl, that her father has been having sexual intercourse with her for the past two years.

Because of the committee's lack of familiarity with the social, medical and psychological aspects of incest, I have requested briefing reports from

experts in those areas on the general problems of incest to aid the committee in reaching a decision. In addition, I have requested reports by a juvenile court judge and a legal aid attorney on judicial proceedings that might result from a charge of incest. Enclosed are reports by:

(1) Dr. Hillary Hope, Director, National Children's Protection League;
(2) Ms. Mary Noble, Supervisor of Caseworkers, Marshall Department of Protection Services;
(3) The Honorable Richard Chancellor, Circuit Court Judge, Juvenile Division, State of Marshall; and
(4) Brenda Challenger, Esquire, Chief Staff Counsel, Marshall City Legal Services, Inc.

Please review these materials and be prepared to discuss and take a preliminary vote on this inquiry at our committee meeting on January 25.

REPORT ON SEXUAL ABUSE OF CHILDREN BY DR. HILLARY HOPE, DIRECTOR, NATIONAL CHILDREN'S PROTECTION LEAGUE

Child abuse and neglect have reached "epidemic proportions" in this country.[1] The federal government has awarded millions of dollars in local grants to support programs to increase protective services and reporting of neglect and abuse of children.[2] Yet, one immense and pervasive type of maltreatment, sexual abuse,[3] has attracted relatively little concern even among health care professionals.[4] Doctors and psychiatrists routinely label complaints of incest as mere fantasy.[5] A diagnosis of child sexual molestation makes everyone uncomfortable[6] and many people angry and outraged.

An annual estimate of over 5,000 cases of father-daughter incest[7] is considered the "tip of the iceberg."[8] Only a small fraction are reported when they happen; most come to light years later.[9] Incest occurs within the privacy of the family and is kept secret, which makes it impossible to know the real magnitude of the problem.[10] Dr. C. Henry Kempe, pioneer researcher and a foremost authority on child abuse, described the situation: "It is usually hidden for years and only becomes known because of some dramatic change in the family situation, such as adolescent revelation of delinquent acts, pregnancy, venereal disease, a variety of psychiatric illnesses, or some-

1. A. GREEN, CHILD MALTREATMENT 285 (1980).
2. *Id.* at 286.
3. De Francis, *Protecting the Child Victims of Sex Crimes Committed by Adults*, 35 FED. PROBATION, Sept. 1971, at 15, 17.
4. Steele, *Psychodynamic Factors in Child Abuse* in THE BATTERED CHILD 72 (C. Kempe & R. Helfer 3d ed. 1980). *See also* Sgroi, *Sexual Molestation of Children*, CHILDREN TODAY, May-June 1975, at 18-19.
5. Kempe, *Incest and Other Forms of Sexual Abuse* in THE BATTERED CHILD 198, 198-99 (C. Kempe & R. Helfer 3d ed. 1980).
6. *Id.*
7. A. GREEN, *supra* note 1, at 119.
8. Schechter & Roberge, *Sexual Exploitation* in CHILD ABUSE AND NEGLECT 127, 130 (C. Kempe & R. Helfer eds. 1976).
9. Kempe, *supra* note 5, at 198-99.
10. Radbill, *Children in a World of Violence: A History of Child Abuse* in THE BATTERED CHILD 3, 10 (C. Kempe & R. Helfer 3d ed. 1980).

thing as trivial as a sudden family quarrel."[11] The acts often continue over many years and "may be carried out under actual or threatened violence or may be nonviolent or even tender, insidious, collusive, and secretive."[12] Generally, the whole family actively or passively supports "incestuous equilibrium."[13]

Authorities believe that incest is increasing.[14] Factors contributing to this increase are the loosening of sexual mores, ready availability of birth control and abortion, and higher divorce and remarriage rates.[15] Another factor is generational cycling, a widely recognized phenomenon of sexual abuse: those abused become the abusers of the next generation.[16] This cycle is likely to continue unless the family can be helped to function more normally, because incest is not an isolated incident in an otherwise healthy family situation.[17]

The most common form of incest is between father and daughter,[18] however, father-son,[19] mother-son[20] and mother-daughter[21] incidents have also been reported, as well as incidents between siblings.[22] Because father-daughter incest "is potentially the most damaging to the child and family [and the] most frequently prosecuted by the courts,"[23] my remarks focus primarily on the father as abuser and the daughter as victim. In that situation the mother usually is aware of what is happening but does not protest.[24] In fact, she often condones and even aids and abets the crime,[25] perhaps out of fear of physical violence or of losing her husband, which would leave the family destitute.[26] This places the victim in a vulnerable position, defenseless[27] against paternal threats, force, or enticements.[28] To the child, her father is a trusted authority figure who "can do no wrong."[29] This gives him great power over her. Vincent De Francis, Director of the Children's Divi-

11. Kempe, *supra* note 5, at 198-99.

12. *Id.* at 198.

13. Schechter & Roberge, *supra* note 8, at 129.

14. Kempe, *supra* note 5, at 204.

15. *See id. See also* Schechter & Roberge, *supra* note 8, at 130.

16. De Francis, *supra* note 3, at 20. *See also* A. GREEN, *supra* note 1, at 38, 88, 285.

17. *Incest and Family Disorder*, BRIT. MED. J., May 13, 1972, 364, 365. *See also* Steele, *supra* note 4, at 73.

18. "Seventy-eight percent of all reported incest involves father-daughter; eighteen percent sibling; 1 percent mother-son; and the remainder, multiple relationships within the family." Schechter & Roberge, *supra* note 8, at 131. *See, e.g.*, Adams & Neel, *Children of Incest*, 40 PEDIATRICS 55, 57-58 (1967) (reporting statistical findings).

19. *See, e.g.*, Bender & Blau, *The Reaction of Children to Sexual Relations With Adults*, 7 AM. J. ORTHOPSYCHIATRY 500, 502 (1937).

20. *See, e.g.*, Yorukoglu & Kemph, *Children Not Severely Damaged by Incest With a Parent*, 5 J. AM. ACAD. CHILD PSYCHIATRY 111 (1966).

21. *Id.* at 112.

22. *See, e.g.*, Adams & Neel, *supra* note 18, at 57.

23. Giarretto, *Humanistic Treatment of Father-Daughter Incest*, in CHILD ABUSE AND NEGLECT 143, 146 (C. Kempe & R. Helfer eds. 1976).

24. De Francis, *supra* note 3, at 19.

25. *Id. See also* A. GREEN, *supra* note 1, at 51, 120; Kempe, *supra* note 5, at 205.

26. De Francis, *supra* note 3, at 16-17.

27. Kempe, *supra* note 5, at 209.

28. De Francis, *supra* note 3, at 18.

29. Peters, *Children Who Were Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 398, 411 (1976).

sion of the American Humane Association, described the psychodynamics in a report on a three year study of sexual abuse he directed in New York City: "The offender used the child's strong desire not to displease him, even though, to the child, the adult's request may have seemed unpleasant, or distasteful, or even bizarre. . . . A subtle threat underlies the compliance of the child in these circumstances."[30] Can the child really be considered a "willing victim"[31] under these circumstances, or "not always [an] unwilling" partner,[32] as some commentators assert?

When the mother sides with the father against the child victim, the child feels isolated and helpless and is usually plagued by feelings of insecurity, confusion, guilt and worthlessness since she does not know where to turn for help.[33] For older children the dilemma is staggering because they realize that the reaction to confiding this information may be disbelief, anger, ostracism or maybe even destruction of the family. Dr. Kempe said:

> They are in no way assured of ready help from anyone, but risk losing their family and feeling guilty and responsible for bringing it harm if they share their secret. Youngsters may only come to the attention of the health care system or the law through pregnancy, prostitution, veneral disease, drug abuse, or antisocial behavior.[34]

When parents are confronted with their roles in the wrongdoings, some deny the incest, rationalize it, or even shrug it off. One mother responded that her husband "gave up smoking and needed something to help him through."[35] Some offenders righteously defend the incest as natural,[36] the right of a parent,[37] or good for the child.[38] A frequent defense is that the child seduced the parent.[39] Although some observers give credence to this charge, recent researchers view the child's behavior as innocent affection-seeking,[40] and place the entire responsibility for setting appropriate limits of family intimacy on the parents.[41] If parents do not set appropriate limits, or if a father's perception and inhibitions are weakened by the use of alcohol or drugs, he may introduce sex in response to the child's simple affection-seeking behavior and wrongly blame the child for seducing him.[42] In a study of sexual abusers of children referred for psychiatric evaluation, the researcher discounted the child's role as an important external circumstance inducing the sexual maltreatment.[43]

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30. De Francis, *supra* note 3, at 18.

31. Schechter & Roberge, *supra* note 8, at 141.

32. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 63 (1979).

33. *See* Peters, *supra* note 29, at 418.

34. Kempe, *supra* note 5, at 208.

35. Schechter & Roberge, *supra* note 8, at 132.

36. Summit & Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 AM. J. ORTHOPSYCHIATRY 237, 242 (1978).

37. *Id.* at 245.

38. Steele, *supra* note 4, at 74.

39. *Id.*

40. *See* Peters, *supra* note 29, at 411-12.

41. Summit & Kryso, *supra* note 36, at 239.

42. *See* Peters, *supra* note 29, at 411.

43. Swanson, *Adult Sexual Abuse of Children*, 29 DISEASES NERVOUS SYSTEM 677-78 (1968).

The impact of parental incest on the victim is hard to assess because many of the more serious problems do not appear until years later,[44] and because there is a paucity of carefully controlled long-term studies of incest victims.[45] Most clinical studies, however, have reported a variety of disturbances ranging from personality disorders,[46] psychosomatic complaints,[47] psychological difficulties and sexual maladjustments[48] to full-blown psychoses.[49] A number of studies on incest and sexual abuse of children show that the fact that the child was the victim of a trusted and respected figure causes confusion, distrust and psychiatric disorders later in life.[50] One team of researchers said, "It is the recognition of having been exploited and uncared for as an individual human being that leads to the long-lasting residual damages of sexual abuse in development, rather than the actual physical sexual act itself."[51] Pregnancy, vaginitis and syphilis were among the physical effects suffered by some incest victims,[52] but the psychological effects may have been even more serious. While depression and guilt were prevalent,[53] fatigue, loss of appetite, aches and pains, inability to concentrate and sleep disturbances were psychosomatic complaints suffered by almost all victims in one study of father-daughter incest.[54]

Researchers Bender and Blau found immediate harmful effects on personality development that varied with the developmental stages of the child.[55] Some children showed reversion to or prolonged infantile behavior, others showed handicapped educability and social adaptations, while still others showed precocious and inappropriate development of adolescent characteristics and adjustment difficulties.[56] The researchers also found anxiety and confusion in the victims' social relations, and concluded that incest distorted their attitudes toward family members and, later, toward society in general.[57]

The turmoil these children endure may not, however, be recognized at the time of the incident because children frequently repress the experience.[58] They may be emotionally withdrawn and appear unaffected by the rape, but repression frequently results in psychological problems[59] which are man-

44. Peters, *supra* note 29, at 417.

45. A. GREEN, *supra* note 1, at 124.

46. Yorukoglu & Kemph, *supra* note 20, at 111.

47. Lewis & Sarrel, *Some Psychological Aspects of Seduction, Incest, and Rape in Childhood*, 8 J. AM. ACAD. CHILD PSYCHIATRY 606, 613 (1969).

48. Yorukoglu & Kemph, *supra* note 20 at 111.

49. *Id.*

50. Steele, *supra* note 4, at 75; Peters, *supra* note 29, at 418.

51. Steele, *supra* note 4, at 75.

52. A. GREEN, *supra* note 1, at 123. *See also* Bender & Blau, *supra* note 19, at 502.

53. Kaufman, Peck & Tagiuri, *The Family Constellation and Overt Incestuous Relations Between Father and Daughter*, 24 AM. J. ORTHOPSYCHIATRY 266 (1954).

54. *Id.*

55. Bender & Blau, *supra* note 19, at 516.

56. *Id.*

57. *Id.*

58. Sloane & Karpinski, *Effects of Incest On the Participants*, 12 AM. J. ORTHOPSYCHIATRY 666 (1942).

59. Peters, *supra* note 29, at 420.

ifested in unsatisfying personal and sexual relationships later in life.[60] Yet, some researchers fail to appreciate the seriousness of "the interpersonal impairment the child has suffered because the victim remains in the same family group with the offender and silently tolerates repeated assaults."[61] Furthermore, "[e]ven if the assaults themselves are not repeated, there can be extensive psychologic difficulties if the victim and the offender remain living in the same household when the victim goes through adolescence,"[62] because anxiety impairs the functioning of the ego.[63] Researchers have found that disturbance of the parent-child relationship jeopardized the child's development, and that "[t]he underlying craving for an adequate parent, then, dominated the lives of these girls."[64]

"In cases of father-daughter incest, the psychopathology of the daughters ranged from severe personality disorder and sexual maladjustment to manifest psychosis."[65] Studies show that their problems have also included drug addictions,[66] prostitution[67] and homosexuality.[68] With consequences of such magnitude, every effort must be made to educate parents and to protect children from sexual abuse at the hands of their trusted caretakers. For those children who have been victimized, enlightened and sensitive programs of therapy and treatment must be provided to help salvage their young lives. Reporting child abuse should be everyone's responsibility.

REPORT ON SEXUAL ABUSE OF CHILDREN BY MS. MARY NOBLE, SUPERVISOR OF CASEWORKERS, MARSHALL DEPARTMENT OF PROTECTIVE SERVICES

The increasing child abuse caseload is placing heavy demands on community resources to provide protective and rehabilitative services to the child and the family.[69] Ideally, the community should provide the family with support services such as caseworkers; visiting nurses; visiting homemakers; child day care; mental health services, including individual and group counseling; and short and long-term therapy for the victim, parents and siblings under social services supervision.[70] When home-based services and treatment are not available, foster care and court action may be the only recourse.[71] The immediate concern should be the victim's safety which may require removal, at least temporarily, to a children's shelter or foster home, particularly if the offender remains in the family home.[72] Removal from the

60. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 32, at 63.
61. Peters, *supra* note 29, at 412.
62. *Id.*
63. Lewis & Sarrel, *supra* note 47, at 619.
64. Kaufman, Peck & Tagiuri, *supra* note 53, at 277.
65. Yorukoglu & Kemph, *supra* note 20, at 111.
66. Giarretto, *supra* note 23, at 146.
67. Kempe, *supra* note 5, at 208.
68. Yorukoglu & Kemph, *supra* note 20, at 111.
69. A. GREEN, *supra* note 1, at 137.
70. *See id.* at 288.
71. *See id.* at 10, 218, 234. *See also* Newberger & Bourne, *The Medicalization and Legalization of Child Abuse*, 48 AM. J. ORTHOPSYCHIATRY 593, 595, 603 (1978).
72. *See* Peters, *supra* note 29, at 419.

family, even temporarily, may cause the child to feel rejected, banished, unloved and insecure which compounds the guilt and shame already felt.[73] The child needs competent counseling or treatment to deal with this stress and inner-turmoil.[74]

Intervention by the state has distinct and predictable consequences for every member of the family. Examination of the victim in a hospital or clinic may be required, which can be a bewildering and frightening experience for a child. Recounting details of the assault to police and intake officers in what may be an insensitive interrogation, can make the victim feel badgered, threatened and demeaned.[75]

For the family, state intervention invariably engenders shame, humiliation and hostility at having their private lives open to public view and censure, plus resentment toward the victim for causing this intrusion.[76] Protective measures, viewed by professionals as helpful to a family in crisis, may seem punitive and vindictive to family members.[77]

State intervention for the offender means community indignation and outrage, the stigma of being labeled "unfit" or "abusive" and, perhaps ultimately, the retribution of the criminal justice system.[78] If convicted and imprisoned, the offender may be threatened and assaulted by inmates who regard child abusers as the lowest kind of criminal.[79] Furthermore, if the offender is acquitted of criminal abuse charges, he may feel vindicated and justified in resuming the incest[80] or punishing the victim by unreasonable chores and demands, oppressive rules, restrictions, sanctions, and other forms of blatant or subtle harassment.[81]

If the victim remains in the home or is later restored to the family, she may be shunned, ostracized or tormented by her parents and siblings for causing so much trouble and embarrassment for the family, thus reinforcing her feelings of guilt, unworthiness and low self-esteem.[82]

The abuse charges may be followed by proceedings to terminate parental rights. The judicial process, whether criminal or civil, makes adversaries of family members by requiring them to testify against each other.[83] Questioning the victim about details of the assault, testifying, and being cross-examined may be as harrowing and harmful as the incest itself, if not more so.[84]

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73. *See* Sgroi, *supra* note 4, at 21. *See also* A. GREEN, *supra* note 1, at 219.

74. *See* A. GREEN, *supra* note 1, at 187. *See also* Johnson, *The Sexually Mistreated Child: Diagnostic Evaluation* in THE ABUSED CHILD IN THE FAMILY AND THE COMMUNITY 943, 949 (C. Kempe, A. Franklin & C. Cooper eds. 1980).

75. *See* De Francis, *supra* note 3, at 17.

76. A. GREEN, *supra* note 1, at 227. *See also* Giarretto, *supra* note 23, at 148.

77. Newberger & Bourne, *supra* note 71, at 602.

78. *Id.* at 601.

79. *Incest and Family Disorder*, *supra* note 17, at 365.

80. Newberger & Bourne, *supra* note 71, at 600. *See also* Duquette, *Liberty and Lawyers in Child Protection* in THE BATTERED CHILD 316, 317 (C. Kempe & R. Helfer 3d ed. 1980).

81. Giarretto, *supra* note 23, at 144.

82. *Id.*

83. Schechter & Roberge, *supra* note 8, at 129.

84. De Francis, *supra* note 3, at 17.

Once the judicial process is invoked, the outcome is unpredictable. At worst, from the family's viewpoint, the offender may be imprisoned, the wife and children made destitute, the victim removed from the loved ones' home and placed with strangers, and parental rights terminated.[85] At best, with good family support resources, a humane and enlightened program tailored to the individual family may provide the treatment and therapy necessary to stop the incest, protect the child, rehabilitate the offender, and stabilize and reunite the family, which should be the ultimate goal.[86] When it succeeds, state intervention is vindicated, but when it fails, harm and suffering may be compounded. It is incumbent upon the community to provide the resources and upon professionals to work together to make it succeed.

CHILD ABUSE AND THE LEGAL PROCESS: A JUDGE'S PERSPECTIVE

BY HONORABLE RICHARD CHANCELLOR, CIRCUIT COURT JUDGE, JUVENILE DIVISION, STATE OF MARSHALL

> Because of the very nature of the offense and the almost certain danger to the child, any known cause of apparent child battering should be brought into the legal process of investigation, referral to court and a court proceeding.
>
> The quality of this process determines the kind of results obtained. To deal effectively with child abuse, all parts of the system must have the same goals. These include the immediate protection of the child, ascertaining the reasons for parental abuse, treatment of such causes and, ultimately, a permanent return of the child to a well-adjusted home, preferably his own.
>
> Judge James J. Delaney[87]

Several types of laws are designed to protect children from abuse. Criminal statutes and ordinances can be invoked to punish offenders. Under juvenile or family court acts, the court may institute protective supervision or termination of parental rights when parents are found to have abused or neglected their children. Protective services are part of public child welfare laws in most states and all states have laws that require reporting known or suspected child abuse or neglect.[88]

Criminal statutes protect children from sexual misconduct, such as statutory rape, indecent liberties, incest, and sexual battery.[89] Once set in motion, the criminal process is "formidable, impersonal and unrelenting. . . .; its aim is primarily punitive rather than therapeutic."[90] The process usually begins with an information filed by a public prosecutor, followed by an arrest warrant, arraignment at which the offender receives formal notice of the charges and of his rights, including court-appointed counsel for indigent defendants, and posting bond or release on his own recognizance pending

85. *See* Kempe, *supra* note 5 at 199. *See also* Giarretto *supra* note 23, at 144.

86. *See* Kempe, *supra* note 5, at 209.

87. Delaney, *The Battered Child and the Law* in HELPING THE BATTERED CHILD AND HIS FAMILY 187, 198-99 (C. Kempe & R. Helfer eds. 1972).

88. Paulsen, *The Law and Abused Children* in THE BATTERED CHILD 175, 175-76 (R. Helfer & C. Kempe eds. 1968).

89. Delaney, *supra* note 87, at 188.

90. *Id.* at 189.

trial.[91] After investigation by the prosecution and defense counsel, the court may accept a plea bargain. "Depending on the strength or weakness of the state's evidence, the severity of the injury and the public climate, the prosecutor may agree" to reduce the charge to a lesser offense in exchange for a plea of guilty, for example, from felonious assault to simple assault, a misdemeanor.[92]

After a "guilty" plea or conviction following a trial, the defendant may apply for probation if he is not a persistent offender. A presentence or probation investigation is usually conducted and may include psychological or psychiatric evaluation, but seldom delves into the underlying cause of the abuse or proposes a positive plan for supervision or treatment of the offender.[93] Probation services seldom have any therapeutic effect because personnel usually are not trained to understand or deal constructively with the pathology of child abuse. This deficiency and the repugnancy of the crime often result merely in punitive, restrictive surveillance, making rehabilitation improbable under the criminal justice system. Judge Delaney observed that after acquittal or release, the offender is likely to resume the conduct, but more cautiously.[94] He described the situation in this way:

> [T]he criminal process as a solution to child abuse is usually totally ineffective. Probably it has some deterrent effect on the parent capable of controlling his conduct, but its chief value lies in satisfying the conscience of the community that the wrong to a child has been avenged. That the true causes of the battering parent's conduct have not been sought out and treated is of little concern.[95]

Most cases of child abuse are referred to juvenile or family court and are tried as dependency cases.[96] The proceedings involve two distinct phases: first, an adjudication of dependency upon a finding of abuse; second, the ultimate disposition.[97] At the initial hearing the court must decide whether danger of repeated assault requires temporary removal of the child from the home. The court must weigh the risk of further abuse against the potential long-range emotional damage to the child and parents caused by temporary protective care.[98]

When the case is tried in juvenile or family court,[99] statutes sometimes permit limited use of written reports and other types of evidence that might not be admissible under strict evidentiary rules. The quantum of proof required to sustain a finding of abuse or neglect is usually a preponderance of

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91. *Id.* at 189-90.
92. *Id.* at 190.
93. *Id.* at 191.
94. *Id.*
95. *Id.* at 192.
96. *See, e.g.*, R. BUCHANAN, K. TAYLOR & E. HOFFENBERG, FLORIDA GUARDIAN AD LITEM MANUAL FOR VOLUNTEERS 24 (1980).
97. H. CLARK, DOMESTIC RELATIONS 691 (3d ed. 1980). Polier & McDonald, *The Family Court in an Urban Setting* in HELPING THE BATTERED CHILD AND HIS FAMILY 208, 212 (C. Kempe & R. Helfer eds. 1972).
98. Polier & McDonald, *supra* note 97, at 212.
99. These are civil proceedings in all states except Delaware. Mele-Sernovitz, *Parental Sexual Abuse of Children: The Law as a Therapeutic Tool for Families* in LEGAL REPRESENTATION OF MALTREATED CHILDREN 78 (D. Gross ed. 1979).

the evidence, rather than proof beyond a reasonable doubt as required in criminal court.[100] Pretrial conferences encourage full disclosure of facts and opinions and provide an opportunity to evaluate the evidence and to narrow issues in dispute which may result in a stipulation or consent decree.[101] If not, a trial or adjudication hearing will follow.[102]

Whether actions in juvenile or family courts are more effective than criminal actions in rehabilitating the offender, depends to a large extent on the resources available. In the absence of the needed therapeutic skills and services, "the goal of replacing punishment with treatment . . . [and] incarceration with rehabilitation" may not be achieved.[103] Recent emphasis on procedural reforms, stressing safeguards for defendants, has been described as "cheaper than providing substantive services for those who are mentally ill, engaged in deviant behavior, or are poor. Paradoxically, while adversary proceedings are becoming the fashion of the day and are resulting in dismissals of more cases, there is a growing demand for harsher sentences."[104]

The adversary system pits zealous advocates against each other, each intent on "winning" for his client. This process, however, impedes courts from "dealing with the complex emotional and psychological problems of the troubled family. These people not only desperately need the ministrations of the physician and behavioral expert, but the firm insistence of a court which can insure those services are accepted."[105] Lawyers and judges must place the ultimate welfare of the child and parents over winning or losing the client's goal.[106]

> By using clever courtroom maneuvers the defense attorney can frequently have a neglect petition denied; this he may define as "winning" the case. But in many situations this, in fact, is not "winning" as far as the child is concerned. The attorney who fails to give as much consideration to the child's welfare as he gives to the legal aspects of the case carries a heavy burden if the child is wrongly returned to battering parents.[107]

"The law can never serve the true ends of justice until lawyers and judges alike view the battered child as more than a legal problem."[108] Child abuse involves behavior that is social and medical in origin[109] and the dispositional stage of the proceedings is "primarily diagnostic and social in na-

100. *See, e.g.*, Isaacs, *The Role of the Lawyer in Child Abuse Cases* in HELPING THE BATTERED CHILD AND HIS FAMILY 225, 236 (C. Kempe & R. Helfer eds. 1972). A finding of abuse might ultimately result in termination of parental rights. It should be noted, therefore, that in 1982 the United States Supreme Court held that "[b]efore a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence." Santosky v. Kramer, 455 U.S. 745, 747-48 (1982).

101. Delaney, *supra* note 87, at 202.

102. *Id.*

103. Polier & McDonald, *supra* note 97, at 213.

104. *Id.*

105. Delaney, *supra* note 87, at 194.

106. *Id.*

107. Paulsen, *supra* note 88, at 200.

108. Delaney, *supra* note 87, at 194.

109. *Id.*

ture."[110] The court should be seen "as another resource, along with the social and behavioral scientist, the physician, legal services, the police and other community agencies concerned with prevention, detection and treatment of child abuse and neglect."[111]

Judicial authority should be used to rehabilitate the family whenever possible, or as a last resort, to terminate parental rights. Simply removing the victim indefinitely from the home is not an adequate final disposition.[112] Foster care results in placing the child in unfamiliar surroundings with strangers at a time of emotional turmoil. The child may perceive this as punishment for her wrongdoings,[113] adding trauma and pain[114] to her already heavy burden of guilt, confusion and shame. The separation may continue over a long period of time[115] and in a succession of foster homes[116] to which the child must adapt.[117] While becoming estranged from parents and siblings,[118] she is in a limbo state, not really belonging to a permanent family unit.[119]

"The court must aid in directing the parent through the social service maze and often must use its authority to insure that treatment is afforded."[120] Treatment should include individual and group crisis and aftercare therapy for the victim, the offender, and other family members to correct the dysfunctional family patterns in which the incest occurred. Crisis-oriented social services may also be available, such as visiting nurses, homemakers, tutors, and day care.[121] Coordination of criminal and family or juvenile court proceedings may be necessary to motivate parents to accept the help that is available and to protect the child from further abuse.[122]

Even after disposition, the court should remain involved and schedule periodic reviews. At these reviews the social service agency providing treatment should give an accounting of the services which have been provided and report on the progress of individual family members.[123] The parents should give an accounting of their progress in correcting the underlying

110. Isaacs, *supra* note 100, at 231.

111. Delaney, *supra* note 87, at 197.

112. Polier & McDonald, *supra* note 97, at 223.

113. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 645 (1976).

114. *Id.* at 669.

115. Mnookin, *Foster Care—In Whose Best Interest?* 43 HARV. EDUC. REV. 599, 610 (1973). *See also* Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, 17 FAM. L.Q. 151, 167 (Summer 1983).

116. Wald, *supra* note 113, at 645-46. "[C]hildren in foster care frequently are subjected to multiple placements, destroying the continuity and stability needed to help a child achieve stable emotional development. This may, in fact, be the most damaging aspect of foster care." *Id. See also* Santosky v. Kramer, 455 U.S. 745, 789 n.15 (1982) (Rehnquist, J., dissenting).

117. Wald, *supra* note 113, at 667. "[E]ach time a child is separated attachments may be broken generating insecurity and an inability to form future attachments." *Id.*

118. Polier & McDonald, *supra* note 97, at 214.

119. Smith v. Organization of Foster Families, 431 U.S. 816, 836 (1977). *See also* Mnookin, *supra* note 115, at 613.

120. Delaney, *supra* note 87, at 205.

121. Mele-Sernovitz, *supra* note 99, at 78.

122. Duquette, *supra* note 80, at 325.

123. Delaney, *supra* note 87, at 205.

problems. If the offender is not cooperating or will not or cannot change after a reasonable period of time has elapsed, termination of parental rights may be necessary. This will allow permanent placement or adoption of a child who cannot safely return home[124] and is preferable to allowing the child "to become a displaced person for [the] years of [her] childhood."[125]

REPORT ON JUVENILE COURTS BY BRENDA CHALLENGER, ESQUIRE, CHIEF STAFF COUNSEL, MARSHALL CITY LEGAL SERVICES, INC.

Humanitarian impulses and a desire to "save" rather than punish children who violate the law, led to the development of juvenile courts resulting in not altogether satisfactory dispositions.[126] First, juvenile courts often discriminate based on class or culture.[127] Second, juvenile courts deprive children of their liberty,[128] while depriving parents of their children in constitutionally-questionable proceedings.[129]

The juvenile court system's genesis is a reaction to harsh prison sentences and incarceration of youthful offenders with hardened adult criminals.[130] Theoretically, under the "care and solicitude" of the state[131] "[t]he child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive."[132] The rationale is that the state, acting as *parens patriae*,[133] is merely providing for the child's custody in nonadversary civil proceedings which are not subject to the procedural restrictions required when the state seeks to deprive a person of his liberty.[134] The United States Supreme Court in *In re Gault*[135] described the motives that led to development of juvenile courts and questioned the wisdom of allowing the court to have "unbridled discretion" in the absence of counterbalancing procedural safeguards.[136]

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124. Baker, *Big Brother*, 53 FLA. B.J. 672, 677 (1979).

125. *Id.*

> The advantage of greater short-term support and less long-term custody is not only the cost saving, but it means that the family who cannot make it and provide for its own is much sooner identified. When such families are identified by the failure to improve despite genuine assistance and opportunity to do so, children may be removed sooner from the home and placed in permanent alternative families, such as by commitment for adoption.

Id.

126. In re Gault, 387 U.S. 1, 17-18 (1966).

127. *See* Santosky v. Kramer, 455 U.S. 745, 763 (1982). *See also* Guggenheim, *A Call to Abolish the Juvenile Justice System*, 2 CHILDREN'S RIGHTS REPORT No. 9, 10 (June 1978).

128. *See, e.g.*, *Task Force Report: Juvenile Delinquency and Youth Crime* (1967) in MODERN JUVENILE JUSTICE 48 (S. Fox 2d ed. 1981). "In theory the juvenile court was to be helpful and rehabilitative rather than punitive. . . . In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law." *Id. See also, e.g.*, Fox, *Philosophy and the Principles of Punishment in the Juvenile Court* in MODERN JUVENILE JUSTICE 60-61 (S. Fox 2d ed. 1981). *See also, e.g.*, Guggenheim *supra* note 127, at 8.

129. *See, e.g.*, Davidson, *Confronting Child Abuse*, 5 FAM. ADVOC. 26, 28-29 (Summer, 1982).

130. In re Gault, 387 U.S. 1, 15 (1966).

131. *Id.*

132. *Id.* at 15-16.

133. *Id.* at 16.

134. *Id.* at 17.

135. 387 U.S. 1 (1966).

136. *Id.* at 17-18.

> [T]he highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. . . . Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . ."[137]

Juvenile courts have traditionally had jurisdiction over three types of proceedings: delinquency, status offenses, and child abuse and neglect.[138] My remarks are directed primarily at abuse and neglect, although many of my comments and some authority cited apply to delinquency and status offenses as well. Allegations of abuse or neglect may lead to criminal charges and may result in removal of children from their families through placement in foster care or termination of parental rights.[139]

My first objection to juvenile courts is that they are class-based institutions for the poor and minorities.[140] "Certainly in the great cities of the nation the overwhelming number of children processed through the juvenile court are the children of the poor."[141] Although abuse and neglect occur at all social and economic levels,[142] the upper and middle classes are less likely to be observed[143] and reported.[144] They are also more likely to stay out of court because they have access to privately arranged corrective treatment and private care facilities not available to the poor.[145] The predominantly middle-class professionals dealing with families charged with abuse or neglect are removed from the poor by education and way of life and are often biased in their perceptions and judgments of these families.[146] The United

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137. *Id.*

138. J. AREEN, FAMILY LAW CASES AND MATERIALS 1194 (1978).

139. *See* Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 887-88 (1975). *See also, e.g.*, Lassiter v. Department of Social Services, 452 U.S. 18, 31 (1981).

140. *See* Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694, 697 (1966) [hereinafter cited as Paulsen II].

141. *Id.* at 696.

142. *See* H. CLARK *supra* note 97, at 698. *See also* J. AREEN, *supra* 138, at 888-89.

143. *See* Mnookin, *supra* note 115, at 619. "[S]ince poor families are more subject to scrutiny by social workers who administer welfare programs, their faults, even if no more common, may be more conspicuous." *Id.*

144. *See, e.g.*, Didato, *Violence in the Home: How Much Do You Know About It?* St. Petersburg Times, October 17, 1983, at 2D, col. 1.

> Child abuse cases involving low-income family members surface more often, but the rate reflects a reporting bias. Clinics and social agencies rarely deal with affluent families concerning this matter. Further, police, doctors and therapists are hesitant to report abuse in affluent families. Many experts believe that like alcoholism, family abuse is a problem that plagues all social classes and economic levels.

Id.

145. *See* Paulsen II, *supra* note 140, at 696. *See also* Smith v. Organization of Foster Families, 431 U.S. 816, 834 (1976). *See also* Wald, *supra* note 113, at 674. Many abusive and neglectful parents are "so burdened with problems that they are unable to adequately protect or care for their children. Most such parents are very poor, living in very bad housing, and are isolated from relatives and community support. They generally have few of the skills necessary to cope in our society." *Id.*

146. *See* Paulsen II, *supra* note 140, at 695.

States Supreme Court recognized this problem when it observed: "Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural and class bias."[147]

Handicapped by poverty and lack of education, parents charged with abuse or neglect are no match for the state with its financial resources; access to records; and witnesses including caseworkers empowered to investigate and testify.[148] Once the child is in custody, "the State even has the power to shape the historical events that form the basis for termination."[149] As a result, "many 'voluntary' placements are in fact coerced by the threat of neglect proceedings and are not in fact voluntary in the sense of the product of informed consent."[150]

In the dispositional stage of neglect or abuse proceedings, the "best interest of the child" standard is applied by juvenile courts in deciding whether a child should be removed from parental custody.[151] This "allows the judge to import his personal values into the process, and leaves considerable scope for class bias . . . . [C]ases . . . clearly reveal the risks of 'individualized' decisions under vague judicial standards."[152]

Moreover, "foster care has been condemned as a class-based intrusion into the family life of the poor."[153] It is also highly questionable whether these children will be better off in foster care than in their own homes.[154] In *Santosky v. Kramer* the Court said, "Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare. . . . ('In fact, under current practice, coercive intervention frequently results in placing a child in a more detrimental situation than he would be in without intervention')."[155] Said one commentator:

> For nearly two decades, noted authorities have observed that children removed from their homes and placed in 'temporary' foster care often remain there for many years, frequently until their majority. Such children often suffer serious psychological damage in foster care and are commonly subjected to numerous moves—each of which disrupts the child's need for maintenance of continuity and stability in his relationships with parental figures.[156]

My second objection to juvenile courts is that they deprive children of their liberty,[157] and parents of their children, in constitutionally questiona-

147. Santosky v. Kramer, 455 U.S. 745, 763 (1982).

148. *See, e.g.*, *id.*

149. *Id.*

150. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 834 (1976). *See also* Wald, *supra* note 113, at 675.

151. *See* Mnookin, *supra* note 115, at 619-20.

152. *Id.*

153. Smith v. Organization of Foster Families, 431 U.S. 816, 833 (1976).

154. *See e.g.*, Sussman, *Reporting Child Abuse: A Review of Literature*, 8 FAM. L.Q. 245, 312 (1974). "[Experts] have warned that the 'cure' of removing a child from a poor environment may be worse than the harm to which he is subject." *Id.*

155. Santosky v. Kramer, 455 U.S. 745, 765 n.15 (1982).

156. *Report of the Task Force on Juvenile Justice and Delinquency Prevention*, in MODERN JUVENILE JUSTICE 49, 49-50 (S. Fox 2d ed. 1981).

157. *See Task Force Report: Juvenile Delinquency and Youth Crime*, *supra* note 128. *See also* Gug-

ble proceedings.[158] The right of parents to the custody of their children has been recognized by the United States Supreme Court. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents. . . . [W]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."[159] Moreover, parents are in danger of criminal liability stemming from charges of abuse or neglect.[160] For that reason, "[m]any of the evidentiary issues that arise in civil neglect proceedings result from the tendency to equate such cases with criminal proceedings."[161] Yet, criminal due process safeguards frequently are not accorded as they have been in delinquency cases since *Gault*.[162] Unfortunately, the Court in *Gault* did not expressly extend those protections to abuse and neglect cases.[163]

The Director of the ABA's National Legal Resource Center for Child Advocacy and Protection, has cited these examples of rules of evidence sometimes ignored in the adjudication phase of child abuse trials in juvenile court:

> [O]pinion testimony is permitted without a proper foundation; case records, reports of clinical evaluations, and other documentary evidence are considered by the judge without copies first being made available to counsel for the parents and child; the right to confrontation and cross-examination of all witnesses is denied; the burden of proof inappropriately is placed on the parents to persuade the court that they are fit to care for their child; and the child's wishes are not clearly articulated to the judge.[164]

The Supreme Court has characterized termination proceedings as "formal and adversarial,"[165] "accusatory and punitive,"[166] "a unique kind of deprivation,"[167] "few losses more grievous,"[168] and "few forms of state action are so severe and so irrevocable."[169] Yet, juvenile courts have been reversed and underlying statutes declared unconstitutional for lack of procedural due process.[170] Examples include: failure to provide court-appointed counsel for indigent parents,[171] the necessity of which the Supreme Court

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genheim, *supra* note 127, at 8. "So long as we maintain the myth that the juvenile justice system is designed for the children's own welfare, we leave room for the cynical or myopic to deprive children of their liberty without cause and without meaningful rights." *Id.*

158. *See* Davidson, *supra* note 129, at 28-29.

159. Santosky v. Kramer, 455 U.S. 745, 753-54 (1982).

160. Lassiter v. Department of Social Services, 452 U.S. 18, 31 (1981).

161. *See* J. AREEN, *supra* note 138, at 1111.

162. Guggenheim, *supra* note 127, at 4. "Specifically, *Gault* required that accused juvenile delinquents be afforded four basic procedural protections: notice of charges; right to counsel; the right to remain silent; the right to confront and cross-examine adverse witnesses." *Id.*

163. *See* Davidson, *supra* note 129, at 41-42.

164. *Id.* at 29.

165. Lassiter v. Department of Social Services, 452 U.S. 18, 42 (1981) (Blackmun, J., dissenting).

166. *Id.* at 43 (Blackmun, J., dissenting).

167. *Id.* at 27 (Stewart, J., opinion of the Court).

168. *Id.* at 40 (Blackmun, J., dissenting).

169. Santosky v. Kramer, 455 U.S. 745, 754 (1982).

170. *See* Davidson, *supra* note 129, at 29.

171. *Id.*

has held must be determined on a case by case basis;[172] lack of independent representation of children; neglect of required notice to parents of hearings; and failure to ensure prompt hearings before emergency removal of children from their homes.[173]

Juvenile court becomes, in effect, "little more than a kangaroo court for young people" when blind obedience to the *parens patriae* philosophy results in "disregard of constitutional rights . . . ."[174] It is also a kangaroo court for parents when they lose custody of their children in constitutionally questionable proceedings.[175] Because juvenile courts are class-based institutions discriminating against the poor and minorities,[176] and for the other reasons previously recited, I join critics who call for the abolition of juvenile courts.[177]

MARSHALL STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

MEMORANDUM

TO: Members of the Committee on Professional Ethics
FROM: Lawrence Sage, Chairperson
DATE: February 13, 1984
RE: INQUIRY NO. 84-1: DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS

Enclosed are three draft opinions prepared independently by three committee members after discussion and preliminary vote at our January 25th committee meeting. As you will recall, the preliminary vote was evenly split three ways with one member, Mr. Fencestradler, abstaining.

The three views reflected by the vote are:

(1) The parents' attorney should not reveal the incest and should not suggest appointment of counsel for the children, but if counsel is appointed, the children's counsel should not reveal the incest without client's consent unless the client is incapable of making a considered judgment.

(2) The parents' attorney should suggest appointment of counsel for the children, and both the children's counsel and the parents' attorney should reveal the incest even without their clients' consent.

(3) The parents' attorney should suggest appointment of counsel for the children, and may, but is not required, to reveal the incest. The children's counsel should not disclose the incest over the objection of a client capable of making a considered judgment.

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172. Lassiter v. Department of Social Services, 452 U.S. 18, 31-32 (1981).

173. *See* Davidson, *supra* note 129, at 29.

174. In re Ronald S., 69 Cal. App. 3d 866, 869, 138 Cal. Rptr. 387, 389 (1977).

175. *See* Davidson *supra* note 129, at 28-29.

176. *See* Paulsen II, *supra* note 140 at 697.

177. *See e.g.*, Guggenheim, *supra* note 127 at 5. "Juvenile court will always be unfair; it will always be second class. The right course is to abolish it entirely." *Id.* at 11. *See also, e.g.*, Fox, *Abolishing the Juvenile Court*, 28 HARV. L. SCH. BULL. 22 (1977) [hereinafter cited as Fox II]. *See also, e.g.*, Fox, *supra* note 128, at 60.

A member of each group has prepared a proposed ethics opinion embodying the group's answers to the three questions raised by this inquiry. Because of time constraints, the authors Ms. Truly, Mr. Wright and Mr. Good, have not seen each other's opinions, therefore, the opinions do not respond directly to each other. The final opinion will be written after the committee reaches a consensus and will address opposing arguments on major points of contention.

Please send me your written comments after studying the three proposed ethics opinions. All comments received by February 25 will be sent to you with the agenda for our next meeting. I look forward to receiving your thoughts on this important inquiry.

MARSHALL STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Preliminary Draft of Proposed Ethics Opinion 84-1
Proposal Number I Prepared by Veronica Truly, Esquire

An advisory opinion has been requested as to the obligations of an attorney under the following facts:

> A lawyer has been appointed by the court to represent indigent parents in neglect proceedings. The petition alleges that the children, aged three, six and nine, are not receiving proper care. They are dirty and inadequately fed. The lawyer learns from the husband that he has been having sexual intercourse with their nine year old daughter for the past two years. The wife, who is also a client, confirms this and tells the lawyer that she is afraid to interfere. The lawyer has interviewed the children and reviewed the court-ordered child welfare investigation report. He cannot assume from the report or interviews that anyone besides the mother has discovered the father's sexual abuse of the child.

The court-appointed counsel for the parents asks the following questions:

(1) Whether he should reveal his clients' confidential communications that his client, a father charged with child neglect, has been having sexual intercourse with his nine year old daughter for the past two years; and

(2) Whether he should suggest to the court that counsel be appointed for the children.

Additionally, the committee will address a related question not raised by the inquirer, but which is highly pertinent to his inquiry and constitutes a matter of great public interest:

(3) Whether counsel for the children should reveal confidential communications over the objections of his client, a nine year old girl, that her father has been having sexual intercourse with her for the past two years.

Summary of Opinion: (1) A lawyer appointed to represent parents in child neglect proceedings may not reveal the father's confidential communication which is confirmed by the mother, who is also a client, that the father has been having sexual intercourse with their nine year old daughter for the past two years. (2) The lawyer should not suggest to the court that counsel

be appointed for the children, because it would not be in his clients' best interests to have counsel appointed for the child who has interests adverse to his clients. (3) A lawyer appointed to represent children in neglect proceedings should not reveal, over his nine year old client's objection, her confidential communication that her father has been having sexual intercourse with her for the past two years, unless her age or mental condition renders her incapable of making a considered judgment on her own behalf in directing counsel.

(1) As to the first inquiry, the committee believes that the attorney for the parents should not reveal the information because disclosure would betray the lawyer's sacred trust to hold inviolate confidences entrusted to him by his client.[178] Clients' confidences must be protected from disclosure because lawyers cannot properly advise or represent their clients without knowing all of the facts.[179] Statutes,[180] rules of evidence,[181] and rules of ethics[182] have codified this principle. For example, Canon 4 of the Marshall State Bar Code of Professional Responsibility requires lawyers to preserve the confidences and secrets of their clients, with narrow exceptions not pertinent here.[183] Ethical Consideration 4-1 states:

> A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.[184]

Clients' confidences are likewise protected under Rule 1.6 of the Model Rules of Professional Conduct recently adopted by the American Bar Association.[185]

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178. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1982) [hereinafter cited as ABA CODE]. ABA CODE is the source for all cites to the Marshall Code of Professional Responsibility in text. The Florida state statutes are the basis for all Marshall statutory citations, unless otherwise noted. *See infra* note 228.

179. *Id.*

180. CAL. BUS. & PROF. CODE § 6068(e) (West 1974) provides that it is the duty of a lawyer "to maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client."

181. FLA. STAT. § 90.502 (1983) (dealing with lawyer-client privilege).

182. ABA CODE, *supra* note 178, at EC 4-1 and DR 4-101.

183. ABA CODE, *supra* note 178, at Canon 4 and DR 4-101. DR 4-101 requires that a lawyer not knowingly reveal a confidence or secret of his client except

> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Id. at DR 4-101.

184. *Id.* at EC 4-1.

185. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter cited as MODEL RULES]. Text should be read as if a special committee of the Marshall State Bar Asso-

In addition, Canons 6 and 7 of the Marshall Code require a lawyer to represent his client competently[186] and zealously.[187] Voluntary disclosure of information detrimental to a client without his consent is inconsistent with zealous representation. DR 7-101(A)(3) prohibits a lawyer from prejudicing or damaging his client during the course of the professional relationship.[188] Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client.[189] EC 5-1 states: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests . . . nor the desires of third persons should be permitted to dilute his loyalty to his client."[190]

The Comment to Model Rule 1.2 is even more specific in providing that the lawyer "should defer to the client regarding . . . concern for third persons who might be adversely affected."[191] ABA Informal Opinion 869 (1965),[192] applying provisions similar to the earlier Canons of Professional Ethics,[193] advised that the wife's lawyer in divorce and custody proceedings is ethically bound not to reveal information confided to him by the client that she has become pregnant by a man other than her husband.[194]

The Preamble to the Model Rules stresses the importance of maintaining clients' confidences: "[T]he client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges."[195]

The committee members recognize that paternal incest is a terrible thing for a child to endure; they also recognize that maintenance of the adversary system by upholding the sanctity of confidentiality is of supreme importance. The inquiring attorney has been appointed to represent a father charged with child neglect. To reveal his confidential admission of incest might lead to criminal charges and infringe constitutionally protected rights against self-incrimination. Confidentiality must be placed above prevention of the risk of injury to individuals in particular instances. Confidentiality takes precedence, even if occasionally some people are harmed.

The inquiring lawyer in our fact situation does not know, nor should he be deemed to know, that the parent's abusive conduct will continue. Requiring disclosure under these circumstances undermines the adversary sys-

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ciation is studying the Model Rules to determine whether to recommend their adoption, with or without changes, by the Marshall Supreme Court, to replace the Marshall Code of Professional Responsibility [hereinafter cited as Marshall CPR].

186. ABA CODE, *supra* note 178, at Canon 6.
187. *Id.* at Canon 7.
188. *Id.* at DR 7-101(A)(3).
189. *Id.* at Canon 5.
190. *Id.* at EC 5-1.
191. MODEL RULES, *supra* note 185, at Rule 1.2 Comment.
192. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 869 (1965).
193. ABA CANONS OF PROFESSIONAL ETHICS (1908).
194. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 869 (1965).
195. MODEL RULES, *supra* note 185, at Scope.

tem. If clients cannot be assured that what they tell their lawyers will be held in confidence, they may withhold damaging information and lawyers will be prevented from counseling their clients to refrain from contemplated wrongful acts. The deterrent effect of lawyers' advice to clients undoubtedly forestalls many actions that would be harmful to individuals or society. In the case under consideration, the attorney may be able to deter further acts of child abuse by counseling his client. He should stress the harm and danger of the conduct and the harsh consequences that may result if he persists. The attorney may encourage his client to seek therapy or psychological counseling.[196]

(2) As to the second inquiry, the committee believes that the parents' attorney should not suggest to the court that counsel be appointed for the children because it would not be in his clients' best interests to have counsel appointed for a child whose interests are adverse to his clients. In an inquiry to the Committee on Professional Ethics of the State Bar of California,[197] the inquirer asked: "When a lawyer representing a client in child custody proceedings discovers conflicting interests of his client and the child, may he ethically notify the court of the conflict and suggest court appointment of a separate lawyer for the child?"[198] The committee answered in the negative and stated that the committee assumed the information discovered by the lawyer suggested that it would not be in the child's best interests that his client have custody "or that other interests of the child, in good conscience, require independent representation."[199] Suggesting appointment of counsel may also be an impermissible breach of confidence. The committee reasoned that information indicating conflicting interests would come within the broad definition of confidences and secrets, which cannot be disclosed under Canon 4; such disclosure would also be contrary to the Canon 7 requirement of zealous representation.[200]

The California opinion reasoned further that the attorney for a parent in child custody proceedings does not concurrently represent the child. The child need not be represented because "[p]resumably he or she is protected by the requirement of substantive law providing that custody is to be awarded 'according to the best interest of the child.' "[201] Our committee agrees with that reasoning and in answer to the inquiry advises that the attorney for the parents cannot ethically suggest representation for the child to the court.

(3) Regarding whether counsel for the children should reveal the incest over the objection of his nine year old client, the committee believes that, if the client is competent to make such a decision, counsel has an obligation to maintain the confidences and secrets in accordance with the child's wishes and should not disclose such confidences. If counsel determines, however, that the child is not competent to make this decision for any reason

196. ABA CODE, *supra* note 178, at EC 7-8.
197. Cal. St. Bar Comm. on Professional Ethics, Formal Op. 1976-37.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*

including immature judgment, the Marshall CPR suggests that counsel decide for her as set forth in EC 7-12:

> Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer . . . . If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. . . . If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client.[202]

Model Rule 1.14 is more explicit and permits counsel to seek appointment of a guardian, but "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[203] The rule states that the lawyer of a client with impaired ability to make adequately considered decisions "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[204] The Comment to the rule notes that "[i]n many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client."[205] Since neither the Marshall CPR nor the Model Rules specify guidelines for determining competency, standards applied by courts in determining competency for children to testify may be relevant. For a child to be competent to testify as a witness most courts require that the child (1) have "sufficient intelligence to receive just impressions of facts,"[206] (2) be capable of relating them clearly, (3) have ability to distinguish between truth and falsehood, and (4) understand that an oath requires one to tell the truth.[207]

Competency to make key representational decisions, however, involves some different considerations. The Comment to Model Rule 1.14, for example, recognizes that "[w]hen the client is a minor . . . maintaining the ordinary client-lawyer relationship may not be possible in all respects. . . . Nevertheless, a client lacking legal competency often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."[208] The Comment continues, "[f]or example, chil-

202. ABA CODE, *supra* note 178, at EC 7-12.

203. MODEL RULES, *supra* note 185, at Rule 1.14(b).

204. *Id.* at Rule 1.14(a).

205. *Id.* at Rule 1.14 Comment.

206. Wheeler v. United States, 159 U.S. 523, 525 (1895).

207. *Id.* The Supreme Court held that a five and one-half year old child was competent to testify in a murder trial, stating:

> [T]here is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge who sees the proposed witness . . . and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath . . . . [T]he decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous.

Id. Most state courts follow the policy established by *Wheeler* and hold that age alone is not grounds for refusing to permit a witness to testify. Stafford, *The Child as a Witness*, 37 WASH. L. REV. 303, 304 (1962).

208. MODEL RULES, *supra* note 185, at Rule 1.14 Comment.

dren as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."[209]

With these provisions in mind, the committee believes that counsel for the children should not reveal the incest over the objection of his client if counsel has determined that the child is competent to make that decision. If the child is not competent, counsel should either act as de facto guardian and make the decision in the child's best interest or see that a guardian *ad litem* is appointed for her.

MARSHALL STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Preliminary Draft of Proposed Ethics Opinion 84-1
Proposal Number II Prepared by Wellington Wright, Esquire

An advisory opinion has been requested as to the obligations of an attorney under the following facts:

[same facts as stated in Proposal Number I][210]

The court-appointed counsel for the parents asks the following questions:

[same questions as in Proposal Number I][211]

Summary of Opinion: (1) A lawyer representing parents in child neglect proceedings should reveal the father's confidential communication, confirmed by the mother who is also a client, that the father has been having sexual intercourse with their nine year old daughter for the past two years. (2) If the court does not appoint counsel for the children, the parents' lawyer should suggest to the court that counsel be appointed. (3) A lawyer appointed to represent children in neglect proceedings should reveal, even without consent, the confidential communication of the nine year old client that her father has been having sexual intercourse with her for the past two years.

(1) As to the first inquiry, the committee believes that the attorney should reveal the information. Because of the helplessness of children at the hands of abusive parents, the overriding concern for welfare and protection of children must take precedence over the client's right to confidentiality. The child may be in great jeopardy and the parents' lawyer may be the only one who knows of such danger. The child is undoubtedly too intimidated, ignorant, or embarrassed to tell anyone. She apparently has told no one in two years. The child placement process has been invoked by filing the neglect petition, and the client's disclosure is highly relevant to the issues raised. Absent the lawyer's disclosure, however, the information will almost certainly remain secret. Some intervention is necessary to assess the situation and devise protection, counseling and treatment.

209. *Id.*
210. Proposal Ethics Opinion I, *supra* text following note 177.
211. *Id.*

It is for the courts to decide the best interest of the children and, in order to make a wise decision, courts should have all of the information available. The attorney has knowledge of activities which indicate his client's propensity for sexually abusing his young daughter, and that it may be a crime of a continuing nature.[212] Although Canon 4 requires lawyers to maintain clients' confidences, an exception is made when the information relates to a client's intention to commit a crime.[213] DR 4-101(C)(3) of the Marshall CPR permits a lawyer to reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."[214] In some jurisdictions (Florida, for example), the language of the Code of Professional Responsibility is mandatory and *requires* the lawyer to reveal the intention of a client to commit a crime.[215]

Model Rule 1.6 prohibits lawyers from revealing information relating to the representation of a client unless the client consents, with the exception that "[a] lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . ."[216] It is reasonable to believe that, without some type of intervention, the crime of incest will continue[217] and will have grave consequences for the child's physical, emotional, and mental health.[218] Such conduct is universally condemned[219] and studies show that parental incest is a traumatic experience for a child and is likely to cause severe and long-lasting harm.[220]

Moreover, all states have child abuse reporting laws,[221] many of which require all citizens, as well as certain named health and child care professionals, to report known or suspected child abuse.[222] Many states also grant tort immunity to those reporting such crimes and abrogate the privileged status of communications between the professional and client or patient.[223] Some statutes place a statutory obligation on lawyers to reveal child abuse.

212. *See, e.g.*, McCoid, *The Battered Child and Other Assaults Upon the Family: Part One*, 50 MINN. L. REV. 1, 31 (1965) (communication of abuse by an adult to his attorney may lead to an inference of further abuse and further criminal conduct).

213. ABA CODE, *supra* note 178, at DR 4-101(C)(3).

214. *Id.*

215. FLA. B. CODE OF PROFESSIONAL RESPONSIBILITY DR4-101(D)(2) (1983).

216. MODEL RULES, *supra* note 185, at Rule 1.6(b)(1).

217. *See, supra* note 212 and *infra* note 263 and accompanying text.

218. *See supra* notes 44-68 and accompanying text.

219. *See* IJA/ABA STANDARDS FOR JUVENILE JUSTICE, ABUSE & NEGLECT 2.1D commentary at 70 (Tentative Draft 1981).

220. *See supra* notes 44-68 and accompanying text.

221. W. WADLINGTON, C. WHITEBREAD & S. DAVIS, CHILDREN IN THE LEGAL SYSTEM 789 (1983).

> All 50 states now have child abuse reporting laws. . . . Today's typical statute defines the class of persons who must report to include at least health care professionals, teachers and social workers. Most statutes provide for civil immunity for one who reports in good faith, and there is generally a waiver of both the husband-wife and physician-patient privileges.

Id.

222. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 465 (1977-78) [hereinafter cited as Besharov II.]

223. Paulsen, *supra* note 88, at 196, 198-99.

In Ohio[224] and Nevada,[225] for example, attorneys are expressly required to report known or suspected child abuse. Some report statutes, Florida's for example, expressly exclude lawyers from reporting.[226] Wisconsin's report statute was amended during the 1984 legislative session to give lawyers discretionary authority to report known or suspected child abuse.[227] Marshall's reporting statute does not expressly exclude or include lawyers among the named individuals required to report. The statute does, however, require reporting by "[a]ny person, including, but not limited to [those named] . . . ."[228] The term "any person" can be construed as broad enough to encompass lawyers.

The New Jersey State Bar Committee on Professional Ethics rendered an advisory opinion on a similar question. The committee's inquiry concerned an attorney representing a mother whose custody of her children was challenged by a state agency. The attorney learned that in the past his client had physically abused her children and "engaged in other conduct toward the children that raises questions as to her fitness as a mother."[229] The committee's opinion focused on the continuing nature of child abuse and "the state's concern in child welfare raising policy considerations different from those involved in the usual criminal or civil case. A child abuse case is a matter calling for the proper protection and custody of the child. Punishment of the offender may be a separate issue for a separate proceeding."[230] The opinion advised that the confidentiality privilege does not apply because "pursuit of the client's objective to maintain parental control will probably constitute fraud on the court in misrepresenting the parent's con-

224. OHIO REV. CODE ANN. § 2151.421 (Page Supp. 1983).

225. NEV. REV. STAT. § 200.502(2)(d) (1979).

226. FLA. STAT. § 415.109 (1983). Florida's report statute abrogates privileged communications as grounds for failure to report "*except that between attorney and client*. . . ." *Id.* (emphasis added).

227. Wisconsin Act 172 (Assembly Bill 296, March 22, 1984).

228. The Florida Statutes are the basis for the Marshall Statutes cited in the text. The Florida Statutes cited herein are standard reporting statutes comparable to reporting statutes in other jurisdictions. These statutes were chosen by the author in allegiance to her home jurisdiction, although the principles set forth are applicable in many other jurisdictions. The major distinction between the Marshall Statutes and the Florida Statutes is that Florida Statute § 415.109, cited above, *supra* note 226, distinctly forbids the attorney from revealing privileged attorney-client communications. The Marshall Statutes do not contain a provision similar to Florida Statute § 415.109. FLA. STAT. § 415.504 (1983).

> (1) Any person, including, but not limited to, any:
>
> (a) Physician, osteopath, medical examiner chiropractor, nurse, or hospital personnel engaged in the admission, examination, care, or treatment of persons;
>
> (b) Health or mental health professional other than one listed in paragraph (a);
>
> (c) Practitioner who relies solely on spiritual means for healing;
>
> (d) School teacher or other school official or personnel;
>
> (e) Social worker, day care center worker, or other professional child care, foster care, residential, institutional worker; or
>
> (f) Law enforcement officer, who knows, or has reasonable cause to suspect, that a child is an abused or neglected child shall report such knowledge or suspicion to the Department of Protective Services.

Id. But see infra text accompanying note 277.

229. N.J. Comm. on Professional Ethics, Op. 280, 97 N.J.L.J. 361 (1974), (Supp.) 97 N.J.L.J. 753 (1974).

230. *Id.*

tinuing fitness . . . ."[231]

Applying the reasoning of the New Jersey opinion to the matter under consideration, the committee recognizes that DR 7-102(B) of the ABA Code[232] and the Marshall CPR[233] has been amended to exempt privileged communications from the requirement that the attorney reveal a client's fraud if he refuses to rectify it.[234] Nevertheless, if not on the basis of fraud, then on the basis of continuing crime, the lawyer should disclose the information. Averting the possibility of grave harm to children should take precedence over the obligation to preserve clients' confidences.

(2) As to the second inquiry, the committee believes that if the court does not appoint counsel for the children, the attorney should suggest that counsel be appointed. The parents' lawyer does not represent the children.[235] They are not parties to the proceedings,[236] but will be greatly affected by the outcome and should have their own counsel appointed to represent their interests.[237] Courts have inherent,[238] and in some states, statutory[239] authority to do so. Child abuse or neglect statutes require or permit the court to appoint a representative for the child,[240] although the exact stage in the proceedings[241] and the representative's functions are seldom specified.[242] Courts in the State of Marshall are not required by statute or court rule to appoint counsel for children in abuse or neglect proceedings, which in Marshall and many other states, are usually tried as dependency

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231. *Id.*

232. ABA CODE, *supra* note 178, at DR 7-102(B).

233. *Id.*

234. *Id.*

235. To do so would be a conflict of interest. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 16, 31 (1976-77). *See also* Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521, 527-530 (1977-78).

236. *See* Comment, *Lawyering for the Abused Child: "You Can't Go Home Again,"* 29 U.C.L.A. L. REV. 1216, 1225 (1982).

237. *See* Bross, *Legal Advocacy for the Maltreated Child*, 14 TRIAL 29, 30 (July 1978).

238. *See, e.g.*, Zinni v. Zinni, 103 R.I. 417, 421, 238 A.2d 373, 376 (1968). "It is well settled that whenever in any judicial proceeding it shall be made to appear that there are interests of a minor to be protected, the judicial officer presiding has the inherent power to appoint a guardian ad litem for the protection of the minor's interests." *Id. See also* Speca, *Representation for Children in Custody Disputes: Its Time Has Come*, 48 UMKC L. REV. 328, 330 (1980).

239. In Florida and some other states, courts are required both by statute and court rules to appoint a guardian *ad litem* to represent the child in all abuse or neglect judicial proceedings. FLA. STAT. § 415.508 (1983) and FLA. R. JUV. P. 8.300. *See also, e.g.*, ILL. ANN. STAT. ch. 40 § 506 (Smith-Hurd Supp. 1979). *See also* Comment, *Lawyering for the Abused Child: "You Can't go Home Again,"* *supra* note 236, at 1222-23.

240. Comment, *Lawyering for the Abused Child: "You Can't go Home Again,"* *supra* note 236, at 1222-23. "[F]orty-one states have adopted statutes mandating the appointment of an independent legal representative for abused and neglected children." *Id.*

241. Fraser, *supra* note 235, at 30.

242. Comment, *Lawyering for the Abused Child: "You Can't go Home Again,"* *supra* note 236, at 1229-30. Some statutes that do specify duties appear to give contradictory directions, for example, those that require that a guardian *ad litem* be appointed require that the guardian be an attorney charged with representing both the child's wishes and the best interests of the child. *See*, Chambers, *The Ambiguous Role of the Lawyer Representing the Minor in Domestic Relations Litigation*, 70 ILL. B.J. 510, 511 (1982). Those statutes appear to leave the child without a spokesperson who will advocate her wishes. *See* Redeker, *supra* note 235, at 540. The guardian may not believe that the child's wishes are in her best interest and these wishes may not be fully aired to the court. *Id.*

cases.[243]

In the situation under consideration the children should be represented,[244] and if the court does not appoint counsel for them, the parents' lawyer should suggest that the court do so, because no one else in the proceeding represents them. Although a petition alleging child abuse or neglect is filed on behalf of a child by the welfare department,[245] the state attorney who represents the petitioner is a prosecutor whose goal is to prove the abuse or neglect alleged in the petition.[246] The welfare department's responsibility is toward the entire family which may conflict with the children's best interest.[247]

(3) As to the related question of whether counsel for the children should reveal the incest over the objections of his nine year old client, the committee believes that given the seriousness of the abuse,[248] the distinct possibility that it will continue,[249] and the questionable competency of the child, counsel should reveal the information. A nine year old child's competency to direct counsel in the child's best interest is problematic, both because of her tender years and the possibility that she has been subjected to manipulative pressures and intimidation capable of clouding the judgment of an even more mature victim of parental incest.[250]

Disclosure should be made whether the representative is an attorney or a guardian *ad litem*. A nonlawyer guardian *ad litem* is not subject to lawyers' codes of ethics imposing confidentiality constraints.[251] Statutes or court rules governing appointment of guardians *ad litem* may, however, impose an obligation on the guardian *ad litem* to maintain the child's confidential communications. Although the distinction in the role of the attorney and the

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243. *See, e.g.*, R. BUCHANAN, K. TAYLOR & E. HOFFMAN, *supra* note 96, at 24.

244. *See, e.g.*, Note, *Due Process for Children: A Right to Counsel in Custody Proceedings*, 4 N.Y.U. REV. L. & SOC. CHANGE 177, 185 (1974). *See also, e.g.*, Sussman, *supra* note 154, at 304, noting the views of two commentators:

> Carson supports counsel for children since conflicts often appear between their rights and interest and those of the state or the parents. Burt points to the necessity for counsel since children often want to remain with their parents even though they have been maltreated and state intervention may be benign.

Id.

245. *See, e.g.*, R. BUCHANAN, K. TAYLOR & E. HOFFENBERG, *supra* note 96, at 9.

246. *Id. See also* Isaacs, *supra* note 100, at 228-29.

247. *See*, R. BUCHANAN, K. TAYLOR & E. HOFFENBERG, *supra* note 96, at 9. *See also* Redeker, *supra* note 235, at 540.

248. *See supra* text accompanying notes 44-68.

249. *See supra* note 212 and *infra* note 263 and accompanying text.

250. *See supra* text accompanying notes 24-32.

251. A guardian *ad litem*'s role is to protect the child's best interest during particular litigation. H. CLARK, *supra* note 97, at 723. Although generally a guardian *ad litem* is not required to be an attorney, *see, e.g.*, FLA. R. JUV. P. 8.300, frequently courts appoint attorneys to serve in that capacity. Presumably, if serving only as guardian *ad litem* for the child, an attorney is not bound by the confidentiality requirements of Canon 4. *See, e.g.*, ILL. ANN. STAT. Ch. 40 § 506 (Smith-Hurd Supp. 1983) (Supp. to Historical & Practice Notes).

> [U]nder section 506, the guardian *ad litem* is also the attorney who has been appointed to represent the child. Thus, perhaps one of the difficulties inherent in the guardian *ad litem* procedure may have been obviated, namely the lack of a privilege of confidentiality as to communications between the guardian *ad litem* and the child.

Id. See also Chambers, *supra* note 242, at 511.

Technically, the child is a "ward" not a "client." *See* State v. Ferriss, 369 S.W.2d 244 (Mo. 1963).

guardian *ad litem* is not always clear, the guardian *ad litem* at least is required to consider the child's wishes along with all of the other circumstances and factors in determining what course of action would promote the child's best interest.[252] The attorney may have a more limited role of advocating the child's wishes to the court, even if he does not agree with them.[253]

If the attorney doubts the child's competency because of her tender years, he may feel compelled to request that the court appoint a guardian *ad litem*.[254] The lawyer could then advocate the child's wishes and the guardian *ad litem* could advocate what he or she determines to be in the child's best interest. The court may, however, perceive this as a wasteful duplication of effort causing added expense and delay. EC 7-12 of the Marshall Code[255] and Rule 1.14 of the Model Rules[256] deal with clients under a disability. Model Rule 1.14(b) says that a lawyer for a client under a disability is permitted to seek appointment of a guardian, but "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[257] Neither this rule nor EC 7-12 is very helpful, however, because they give so little guidance to a lawyer attempting to ascertain whether or not a child is competent to direct counsel and to make considered judgments on the child's own behalf.

MARSHALL STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Preliminary Draft of Proposed Ethics Opinion 84-1
Proposal Number III Prepared by Wallace Good, Esquire

An advisory opinion has been requested as to the obligations of an attorney under the following facts:

[same facts as stated in Proposal Number I][258]

The court-appointed counsel for the parents asks the following questions:

[same questions as in Proposal Number I][259]

Summary of Opinion: (1) A lawyer representing parents in child neglect proceedings may, but is not required to, disclose information revealed in the father's confidential communication, confirmed by the mother who is also a client, that the father has been having sexual intercourse with their nine year old daughter for the past two years. (2) If the court does not appoint counsel for the children, the parents' lawyer should suggest to the court that counsel be appointed. (3) A lawyer appointed to represent children in neglect proceedings should not reveal confidential communications, over the

252. *See* Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 OKLA. CITY U.L. REV. 561, 578-79 (1980).

253. *See, e.g.*, *Counsel for Children: Guidelines for Courts and Counsel in Civil Custody Cases*, 56 CONN. B.J. 484, 488 (1982).

254. *Id.* at 488.

255. ABA CODE, *supra* note 178, at EC 7-12.

256. MODEL RULES, *supra* note 185, at Rule 1.14.

257. *Id.* at Rule 1.14(b).

258. Proposed Ethics Opinion I, *supra* text following note 177.

259. *Id.*

objections of his nine year old client, that her father has been having sexual intercourse with her for the past two years, unless the child's age or mental condition renders her incapable of making a considered judgment on her own behalf.

(1) As to the first inquiry, the committee believes that the attorney may reveal the information, but is not required to do so. Two important interests are in conflict: society's interest in protecting children versus the sanctity of the attorney-client relationship. The helplessness of children too young, frightened, and confused to escape the abuse and neglect or to communicate effectively, can create severe tensions and conflicts for the lawyer. On one hand, his duty under Canon 7 of the Marshall CPR is to represent his client zealously[260] and under Canon 4 his duty is to preserve the client's confidences and secrets.[261] On the other hand, EC 7-10 says, it is the duty of the lawyer "to treat with consideration all persons involved in the legal process and to avoid infliction of needless harm."[262]

If the lawyer reasonably believes that this two-year pattern of recurring sexual abuse will continue, in spite of his client's protestations to the contrary, the lawyer may regard it as being in the nature of a continuing crime[263] that may be revealed under DR 4-101(C)(3) of the Marshall CPR as an exception to the requirement of confidentiality of client's communications.[264] This is consistent with modern medical and social science data recognizing a "battered child syndrome" as a recurring pattern of child abuse.[265] Likewise, under Model Rule 1.6, a lawyer who reasonably believes disclosure is necessary to prevent a client from committing a criminal act which the lawyer believes is likely to result in "substantial bodily harm" may make such disclosure.[266] Codes of professional responsibility in some other states are even stronger, requiring rather than permitting lawyers to reveal clients' intentions to commit crimes.[267]

The Terminology section of the Model Rules defines "reasonably believes" (a term used in Rule 1.6) as denoting "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."[268] Incest with a young child is a crime,[269] and it is reasonable to believe that it will continue,[270] but whether it will result in "substantial bodily harm"[271] may be less clear. Emotional or psychological harm may be

260. ABA CODE, *supra* note 178, at Canon 7.

261. *Id.* at Canon 4.

262. *Id.* at EC 7-10.

263. *See supra* notes 212 and 217 and accompanying text.

264. ABA CODE, *supra* note 178, at DR 4-101(C)(3).

265. *See* Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976). In *Landeros* the California Supreme Court reversed dismissal of a suit by a battered child against a hospital and physician for failure to diagnose and report "battered child syndrome" resulting in further injury to child after being returned home to allegedly battering parents. *Id.*

266. MODEL RULES, *supra* note 185, at Rule 1.6(b)(1).

267. *See, e.g.*, FLA. B. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(2) (1983).

268. MODEL RULES, *supra* note 185, at Terminology.

269. Mele-Sernovitz, *supra* note 99, at 87 n.32. Incest is a statutory offense in all states but Indiana, whose incest statute has been repealed. *Id.*

270. *See supra* notes 212 and 263 and accompanying text.

271. MODEL RULES, *supra* note 185, at Rule 1.6(b)(1).

considered "mental" rather than "bodily" harm. Even if the lawyer reasonably believes the sexual abuse will continue and that it will result in substantial bodily harm, he still has discretion under the Marshall CPR[272] and the Model Rules[273] as to whether or not to reveal the information. If in exercising his discretion he decides not to reveal, the child will be left unprotected from exploitation and harm by parents entrusted with her care.

Also of concern to the lawyer is his knowledge that his disclosure may lead to invocation of the criminal process, foster or institutional care for the child or children, and termination of parental rights. These are all drastic measures which some authorities believe may be even more harmful to a child than the incestuous relationship itself.[274] Nevertheless, in some jurisdictions other than Marshall, disclosure is mandatory and failure to reveal could subject the lawyer to discipline.[275] Moreover, statutes in some jurisdictions, including Marshall, provide criminal sanctions for failure to report known or suspected child abuse.[276] Lawyers, however, are not included among the named individuals required to report child abuse in Marshall.[277]

Thus, whether or not the lawyer should reveal his client's incest depends, first, on the substantive law and second, on his own judgment and assessment of the situation. Since he has discretion in the matter under the Marshall CPR,[278] he will have to decide whether protection of the client's confidences should take precedence over the safety and welfare of children.

(2) As to the second inquiry, the committee believes that the parents' attorney should suggest to the court that counsel be appointed for the children if the court does not do so on its own initiative. This suggestion could be made without disclosing any confidential information to the court by simply suggesting appointment of counsel without specifying a reason, and would be a small intrusion on the attorney-client relationship compared to the crucial interest at stake.

Even if counsel for the children is appointed, the parents' lawyer cannot assume that counsel will learn of the incest, and this leads to another question: May the parents' lawyer disclose the information to the children's counsel? Although the question was not raised by inquiring attorney, the committee addresses it as an important related question, governed by our answer to the inquiring attorney's first question. Unfortunately, neither the Marshall CPR[279] nor the Model Rules[280] specifies to whom disclosure of

272. ABA CODE, *supra* note 178, at DR 4-101(C)(3).

273. MODEL RULES, *supra* note 185, at Rule 1.6(b)(1).

274. *See, e.g.*, Giarretto, *supra* note 23, at 148. "It is evident that typical community intervention in most cases, rather than being constructive, has the effect of a knockout blow to a family already weakened by serious internal stresses." *Id. See also* IJA/ABA STANDARDS FOR JUVENILE JUSTICE, ABUSE & NEGLECT 8.3 commentary at 70-71 (Tentative Draft 1981); J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 32, at 64.

275. *See, e.g.*, FLA. B. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D)(2) (1983).

276. Besharov reported that of the 39 states imposing penalties for failure to report child abuse or neglect, 30 provide a criminal penalty only, one a civil penalty only, and four states and one territory provide both civil and criminal penalties. Besharov II, *supra* note 222, at 480.

277. FLA. STAT. § 415.504 (1983). *But see supra* text accompanying note 228.

278. ABA CODE, *supra* note 178, at DR 4-101(C)(3).

279. ABA CODE, *supra* note 178.

280. MODEL RULES, *supra* note 185.

clients' confidences should be made when required or permitted by the rules. It is the committee's opinion, however, that if the parents' lawyer determines that he may or must disclose his clients' confidences, he should make disclosure to the tribunal or other authority, but not to counsel for the children, because the parents' attorney and children's counsel represent conflicting interests.

(3) As to the related question of whether counsel for the children should reveal the incest over the objection of his nine year old client, the committee believes that if he learns of it from the child herself, the information is a confidence.[281] If he learns of it from some other source during his representation, it is a secret.[282] Either way, the information is confidential and he should not reveal it,[283] assuming that the nine year old child is competent to make such a decision. In assessing her competence, counsel may want assistance from other professionals. The Comment to Model Rule 1.14 states that in dealing with a client under a disability, a "lawyer should consult an appropriate diagnostician for guidance."[284] This guidance may be helpful in assessing the child's competence.

ABA Informal Opinion 1160 (1971) gives similar advice regarding duties and obligations of juvenile court lawyers.[285] One question was whether a lawyer who believes his juvenile client needs help, "should 'urge the child to accept the professional help that is available through the court.' "[286] The opinion cautioned that a lawyer should not try to substitute his judgment for the special knowledge and experience of a professional social worker, penologist, or psychiatrist, and stressed the need for professionals to work together.[287]

If counsel for the children determines that the daughter is not competent to direct him not to make disclosure, he can either seek appointment of a guardian *ad litem*,[288] or take responsibility and decide for himself whether or not to make disclosure.[289] If a guardian *ad litem* is appointed, counsel should disclose the information to the guardian and abide by his or her decision as to further disclosure. If counsel takes responsibility himself for the

281. ABA CODE, *supra* note 178, at DR 4-101(A).
282. *Id.*
283. *Id.* at DR 4-101(B)(1).
284. MODEL RULES, *supra* note 185, at Rule 1.14 Comment.
285. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1160 (1971).
286. *Id.*
287. *Id.*
288. MODEL RULES, *supra* note 185, at Rule 1.14(b). "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." *Id.* The Comment to Rule 1.14 states,

> When the client is a minor . . . maintaining the ordinary client-lawyer relationship may not be possible in all respects. . . . Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

Id. at Rule 1.14 Comment.
289. ABA CODE, *supra* note 178, at EC 7-12.

decision, he will be governed by the same considerations discussed in answer to the first inquiry of this opinion.

If counsel decides not to disclose, he still must decide whether his proper role is advocate for the child's wishes, advocate for what he believes is the child's best interest, or neutral investigator and presenter of evidence including the child's wishes, without advocating that or any other particular position.[290] The neutral role is the approach adopted by the New York Legal Aid Society, when clients in neglect and dependency cases are too young to understand the nature of the action.[291] The Massachusetts Bar Association Committee on Professional Ethics advised a different approach for a lawyer appointed to represent a "child in need of services."[292] The lawyer "should handle the case in the manner he or she considers to be in the best interest of the child, even if contrary to the wishes of the child or the child's parents."[293] Although counsel's role is enunciated by statutes in some states,[294] the matter is unsettled in Marshall. The committee believes, however, that with counsel's advice and guidance, a mutually agreeable position can usually be formulated by the attorney and the child, after weighing options and probable consequences.

FREDERICK R. FENCESTRADLER
Attorney at Law
February 20, 1984

Lawrence Sage, Esquire
Chairperson, Marshall State Bar Association
Committee on Professional Ethics

Re: Inquiry No. 84-1: Disclosure of Confidential Communications

Dear Larry:

When we took our straw vote on this inquiry a couple of weeks ago, I didn't fully realize how complicated this "Catch-22" situation is. After studying the Truly, Wright and Good proposed opinions and the reports of the experts on child abuse, I am more perplexed than ever about how to vote. I am glad we will be able to discuss the matter further at our next meeting.

290. *See* IJA/ABA STANDARDS FOR JUVENILE JUSTICE, COUNSEL FOR PRIVATE PARTIES 3.1(b) at 79-83 (1980).

291. *Id.* at 82.

292. Mass. B.A. Comm. on Professional Ethics, Op. 76-1 (1976).

> Massachusetts General Law, chapter 119, section 21 defines a "child in need of services" to include a child below the age of 17 who persistently runs away from home, or persistently refuses to obey the lawful and reasonable commands of his parents or guardians, or persistently and willfully fails to attend school, or persistently violates lawful and reasonable school regulations.

Id.

293. *Id.*

294. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.630 (West 1983).

> Sec. 10. The court, in every case filed under this act in which judicial proceedings are necessary, shall appoint legal counsel to represent the child. The legal counsel, in general, shall be charged with the representation of the child's best interests. To that end, the attorney shall make further investigation as he deems necessary to ascertain the facts, interview witnesses, examine witnesses in both the adjudicatory and dispositional hearings, make recommendations to the court, and participate in the proceedings to competently represent the child.

Id.

Here are some random thoughts that occurred to me as I pondered the draft opinions.

(1) Allowing disclosure to be within the discretion of the parents' or children's lawyers has some obvious advantages for lawyers in general, such as providing for flexibility in assessment of the seriousness of the crime and degree of harm likely to be inflicted. A lawyer cannot be disciplined for making a bad judgment call. This is supported by a statement in the Scope section of the Model Rules, "[t]he lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure."[295]

On the negative side, lawyers exempt from discipline for failure to make disclosure will be tempted to take the easy way out and never disclose, even when the Code of Professional Responsibility grants them discretion to reveal future crimes.[296] They will pride themselves on their virtue in protecting their client's confidences while ignoring their callous indifference to the suffering of the weakest members of society, abused children.

(2) Another undesirable result of discretionary disclosure is that the same set of facts will produce contrary results at the hands of individual lawyers. The American public will see this as illogical and unconscionable. Respect for law and our legal system will not be enhanced by such arbitrary decision-making.

(3) If breach of confidentiality is a possibility, the question arises as to whether the lawyer should advise his client of the possibility of disclosure at the outset of representation. This question embodies what Professor Monroe Freedman described as "Perjury: The Lawyer's Trilemma." The lawyer is required "to know everything, to keep it in confidence, and to reveal it to the court."[297] Some commentators have suggested that lawyers should give clients a "Miranda warning" that breach of confidentiality is a possibility.[298] Yet, in effect, this is cautioning them "not to be completely candid,"[299] and treating them as "nonclients."[300] This approach to client perjury is used by the Canadian bar.[301] A similar "preventive solution" was suggested by a pair of Florida lawyers who wrote, "The dilemma embodied in Canon 4 . . . is perplexing but not insoluble. Education of the client as to the boundaries of the attorney-client privilege is the key to the problem."[302] This simplistic approach would, in Professor Freedman's words, "take us out of the trilemma by one door only to lead us back by another."[303] In other words,

295. MODEL RULES, *supra* note 185, at Scope.
296. ABA CODE, *supra* note 178, at DR4-101(C)(3).
297. Freedman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 26, (1975).
298. *See, e.g.*, G. HAZARD, ETHICS IN THE PRACTICE OF LAW 50 (1978).
299. Freedman, *supra* note 297, at 29.
300. G. HAZARD, *supra* note 298, at 50.
301. Freedman, *supra* note 297, at 29.
302. Thomas & Barton, *Ethical Dilemma: The Problem Posed by Canon 4*, 3 FLA. B. CRIM. L. NEWSLETTER 3 (June 1979).
303. Freedman, *supra* note 297, at 29.

the lawyer would not "know everything" if his client withheld potentially harmful facts for fear his lawyer would reveal them.

(4) Another question is whether silence on the lawyer's part as to the damning information of his client's incestuous activity constitutes a deception on the court. The court needs all relevant information bearing on the best interest and welfare of young, helpless children. By remaining silent, the lawyer is allowing confidentiality to take precedence over his own humanitarian impulses to help extricate an innocent third party from a harmful and perhaps dangerous situation. Many laypersons would be shocked at the lawyer's professionally-imposed callousness in keeping the information secret.

Philosopher Sissela Bok would probably be shocked, as can be seen from her writings, "[T]he bond of confidentiality can dim the perception of the suffering imposed on outsiders . . . ."[304] She recognizes, however, that in making a promise, one sets up expectations, an equilibrium that is upset by breaking the promise and failing to live up to these expectations, which is unfair.[305] "[P]rofessional promises . . . are granted special inviolability so that those who most need help will feel free to seek it."[306] Although she cautions that promises must have limits,[307] she advocates public debate to set limits and standards for confidentiality and to increase knowledge about what she considers to be "deceptive professional practices."[308] She recommends that those affected should be included among the participants in the debate.[309] This philosophy makes one wonder whether laypersons were sufficiently involved in the Kutak Commission public hearings on the Model Rules.

(5) Let's assume the parents' lawyer decides that his duty is to reveal their secret; how would he go about it? For one thing, he could tell the parents that professional ethics require or permit, depending on whether the language of the pertinent ethics code is mandatory or permissive, that he reveal the information. In Marshall it is permissive.[310] (Should he have advised them of this possibility at the outset before he received the information, as discussed in my third question?)[311] The lawyer could suggest in his advice to the child protection agency that the prosecutor or the court set up an appropriate treatment program for the entire family which would be supervised by the agency or the court. If the parents agree to cooperate and participate in such a program, the prosecutor or the court might agree to drop or suspend the neglect charges and to take no immediate action in regard to the incest admission. With this kind of intervention and help it might be possible to keep the family together and to spare the child the further trauma of court proceedings and possible foster home or institutional

304. S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 150 (1978).
305. *Id.* at 152.
306. *Id.*
307. *Id.*
308. *Id.* at 162-63.
309. *Id.* at 98-106.
310. ABA CODE, *supra* note 178, at DR 4-101(C)(3).
311. *See* text immediately preceding note 297.

care, or permanent parental severance. If this kind of help is not available or the parents do not want it, then whether or not the lawyer should reveal, depends on which of the three proposed opinions prevails.

I look forward to comments from other committee members before we vote on these very difficult and troubling issues at our next meeting.

Cordially yours,
/s/
Frederick R. Fencestradler
Attorney at Law

EPILOGUE

Although the State of Marshall and the individuals named in these materials are purely fictional and bear no resemblance to persons living or dead, the problems described occur. This item appeared in *Newsweek* on January 23, 1984:

> Punishing a Victim
>
> After spending eight days in solitary confinement, a 12-year-old girl named Amy was sent home last week by a California judge. Her crime? Refusing to testify against her stepfather, a physician charged with molesting her. How did authorities learn of the crime? The family voluntarily sought help from a therapist who, under state law, must report all cases of child abuse to the welfare authorities. Will the father be punished? No, all charges were dropped last week when Amy kept her silence. *Now*, can the family begin therapy? Yes. As Amy has learned, home isn't the only place where a child can be abused.[312]

312. *Punishing a Victim*, Newsweek, Jan. 23, 1984, at 70, col. 3.